To be argued by
MILTON POLLACK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 9

HOWARD LAWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PRELIMINARY STATEMENT.

The Government has utterly failed to meet petitioner's arguments that:

1. There was complete failure to prove that petitioner had knowledge that the other defendants owed taxes, had not paid their taxes, and did not intend to pay their taxes. Such knowledge was pre-requisite to conviction of petitioner (Pet.'s Br. pp. 57-61).

2. Absent a claimed tax deficiency or willful failure to disclose the taxpayer's liability there can be no conviction on a Sec. 1154(b) crime (Pet.'s Br. pp. 39-40).

3. The dismissal as to ABC mandated dismissal of Count 9 as to Lawn, the alleged abettor of ABC (Pet.'s Br. pp. 48-9).

These failures alone require dismissal of the indictment.

The Government attempts to answer petitioner's contention that he was entitled to a hearing on trial use of illegal evidence, by arguing erroneously that such hearing was not denied.

The Government in effect concedes that illegal evidence (Exs. 61A-B) was used to convict Lawn ("the prosecutor committed an inadvertent mistake," says the Government [Br. 36]), but argues the Government, there was no objection and the error, it says, was harmless. But Lawn did object in the manner outlined by this Court in *Coppa* v. *U. S.*, 278 U. S. 224 (1929); and the claim of harmlessness is predicated on matter dehors the record, and is constitutionally unsound.

The Government contends that the prosecutor's substandard conduct should be approved because it was not objected to. That is no answer to the utter lack of procedural due process herein. By skilful manipulation of record references, the Government claims that petitioner's trial counsel opened the door to the prosecutor's inflammatory summation. But an examination of the record itself exposes the hollowness of this contention.

The Government seeks to link Lawn to crime by pointing to trivia, innocent acts, evidence having no probative force, and to attempts to head off prosecution which took place after the alleged crimes were completed. As matter of law these are not sufficient to sustain Lawn's conviction.

I.

EXHIBITS 61A-B ARE SQUARELY WITHIN JUDGE GODDARD'S ORDER OF OUTLAWRY; THEIR USE VIOLATED JUDGE GODDARD'S ORDER; AND THERE WAS NO WAIVER.

The Government in effect now tacitly admits that it used tainted evidence, Exhibits 61A-B, and leads and clues derived therefrom, in order to convict petitioner. It now attempts to evade the effects of this improper use by arguing that it had, throughout this entire proceeding, copies of the proscribed exhibits which it had obtained innocently.

This argument, based as it is upon material not in the record and which the Government has sought to introduce now, at the last moment, is improper. It is also legally inadequate. The thin excuse for thus attempting to influence the decision here is, that petitioner's point as to Exhibits 61A-B allegedly "rests on assertions and factual assumptions outside the record" (Br. No. 9, p. 40).* This allegation is untrue.

A. Petitioner's contentions are based only on the record in the Courts below as certified to this Court.

Petitioner makes no assertion or factual assumption outside the record. Petitioner's contentions as to Exhibits 61A-B rest only, we repeat only, on the record in the courts below as certified to this Court.

Presumably the Government is referring to petitioner's contentions that Exhibits 61A-B had been reproduced by photostatic methods on the same day Lawn appeared before

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* "Br. No. 9" refers to the brief of the United States in *Lawn* v. *U. S.*, Oct. Term, 1957, No. 9.

"Br. No. 10" refers to the brief of the United States in *Giglio and Livoti* v. *U. S.*, Oct. Term, 1957, No. 10.

the Grand Jury from copies produced by Lawn (Br. No. 9, p. 40). This is shown by the record (R. 2798-2803) and by the pink stamp appearing on the insides of the Exhibits themselves (Facing R. 2999 and 3001).

Whether or not the Government had available other copies is legally immaterial—it used the tainted ones. Petitioner's arguments as to Exhibits 61A-B do not depend on whether or not there were other copies in the prosecutor's possession. The point is that there is no record proof that the prosecutor had other copies or that such other copies were untainted.

The originals of Exhibits 61A-B, certified to this Court (Facing R. 2998, 3000), are Grand Jury Exhibits 2 and 4 (R. 2802). They were part of the record before Judge Goddard (R. 2877). In any event petitioner's contentions do not rest thereon.

The facts and inferences set forth in the petition for rehearing in the Court of Appeals are part of the certified record (R. 2977-2986). However, it is not necessary for petitioner to rely thereon.

B. Judge Goddard outlawed and ordered the return of Exhibits 61A-B.

The Government seems to argue that petitioner had no privilege with respect to Exhibits 61A-B (Br. No. 9, p. 45), and that Judge Goddard did not order their return because they were photostats (Br. No. 9, pp. 45-48).

First, this is a collateral attack on Judge Goddard's order which the Government concedes is beyond attack (Br. No. 9, p. 43; Br. No. 10, p. 13 n. 1).[1] The fact is that Judge God-

[1] It is unimportant what effect the decision of this Court in *Costello v. U. S.*, 350 U. S. 359 (1957), has upon so much of Judge Goddard's order as dismissed the indictments. Whether or not the 1952 indictments should have been dismissed, it is still firmly the law that documents obtained in violation of the constitutional privilege against self incrimination may not be used on a trial and must be returned to a defendant. This is the aspect of Judge Goddard's order on which petitioner relies.

dard held that Lawn had a privilege as to the Exhibits, and, contrary to the Government's contention Judge Goddard's decision was precise as to which classes of papers were privileged and which were not.

As to the four documents produced by Lawn, Judge Goddard specifically referred to them as partnership papers produced by Lawn in obedience to the subpoena (R. 2867).

Thus the order of Judge Goddard directing the return of partnership and personal papers to the defendant who produced them (R. 2871), could only have reference, in context, to the papers which became Trial Exhibits 61A-B.

Judge Goddard expressly distinguished between corporate and non-corporate records. The former did not have to be returned (R. 2869), but the latter had to be returned (R. 2871).

If Judge Goddard was in error in ordering the four papers returned to Lawn, it is too late for the Government to challenge the order. But there was no error.

Exhibits 61A-B bore Lawn's personal endorsement (R. 2995) and showed the receipt by him of moneys. It was the purpose of the prosecutor and he proceeded to claim that this receipt of money through this endorsement represented fruits of crime. Lawn had possession and the right to possession of the evidence that he had received money in the form of an endorsed paper carrying his signature. The papers were plainly records personal to Lawn as much as anyone else, and were personally in his hands.

Regardless of to whom the papers should have been returned they were unavailable to the Government; they had been outlawed.

As this Court held in *McDonald* v. *U. S.*, 335 U. S. 451, 456 (1948):

> "If the property had been returned to McDonald, it would not have been available for use at the trial.

> We can only speculate as to whether other evidence which might have been used against Washington would have been equally probative."

Second, when Lawn moved before Judge Goddard for a return of documents, the only documents in the Government's possession coming from him were four photostatic copies marked Grand Jury Exhibits 1 through 4. The 1952 Grand Jury, in indicting Lawn, thus had before it only photostatic copies of his papers. The motion before Judge Goddard was directed to these papers. Judge Goddard specifically ordered the return of "any and all partnership and personal records produced by them * * *." (R. 2873). The four papers which Lawn produced are specifically recited in the course of Judge Goddard's opinion (R. 2867: "Lawn produced four partnership papers in obedience to the subpoena."), and these four papers could refer only to photostatic copies, since those were the only papers the Grand Jury had.

The record makes it clear that Judge Palmieri also directed the return of "the partnership and personal records produced by defendants * * *" (R. 184).

But even if the orders of the two District Judges did not by their very terms apply to photostatic copies, it should be plain to the Government that these orders could not be circumvented by using photostatic copies. Were it not for the Government's argument, petitioner would have thought that this matter had been settled once and for all by *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920). The strictures of the Supreme Court of California upon similar conduct in *People* v. *Berger*, 44 Cal. 2d 459 (1955), are pertinent here.

The Government is in a hopeless dilemma. Its brief confesses that the use of Exhibits 61A-E on the trial was "an inadvertent mistake," "the prosecutor committed an inadvertent mistake" (Br. No. 9, pp. 49, 36). It confesses further that such use was "inconsistent with the affidavits submitted by the prosecutor and his associates (e.g. R. 82, 2948)" (Br.

No. 9, p. 49]. Inconsistently, the Government then argues that the use of Exhibits 61A-B on the trial did not invade petitioner's constitutional rights because these exhibits were not among the exhibits suppressed and ordered returned, since they were merely copies (Br. No. 9, p. 47). But if Exhibits 61A-B were not tainted, why does the Government confess that the prosecutor "committed an inadvertent mistake" and say "the other copy could have been offered" (Br. No. 9, p. 36)? Candor requires the Solicitor General at long last to admit plainly and unequivocally—if he speaks at all on the subject—that no other copies of Exhibits 61A-B were in the possession of the prosecutor until nearly one year after the trial was over (R. 2977).

C. Petitioner did not waive compliance with Judge Goddard's order or authorize the prosecutor to use Exhibits 61A-B.

The Government in effect contends that Lawn waived any objection to the use of Exhibits 61A-B, (i) by appearing before the recently mentioned administrative hearing of May 1952, and allegedly delivering a photostatic copy of the check and check stub to the New Jersey United States Attorney, and (ii) by failing to object when Exhibits 61A-B were offered on the trial (Br. No. 9, pp. 41-2, 48-9).

The Government is in error on both counts.

If its statement of the facts is accurate, there is absolutely no justification for the Government's failure or refusal to call to Judge Goddard's attention, when he was passing upon defendants' motion for outlawry and return of illegally obtained evidence, the fact—if it be a fact—that Lawn had voluntarily produced a copy of the check and the stub and turned them over to the Government before he appeared before the New York Grand Jury.

It was incumbent on the Government on the motion before Judge Goddard to object to outlawry of Grand Jury Exhibits 2 and 4 on the ground that the Government had independently

obtained, through innocent means, the substitutes now me
tioned in this Court, and that petitioner had earlier agre
that the substitutes could be used against him "in any p
ceedings which the Government may bring." This wou
have given Lawn at least the opportunities of confrontati
and cross-examination in open court, opportunities the Go
ernment seeks now to deny to Lawn.

The Government took no such action. It suffered t
Court to enter an order which—on the Government's theo
it would not have, had all the facts been presented to it.

No party to a suit, and certainly not the Government
a criminal case, may dole out to the Court and to its oppone
such portions of the evidence in its possession as it desi
and then, after suffering some misfortune, attempt to bri
forward the rest, as the Government has done in this ca
if the Government really was possessed of the transcript
May 12, 1952 at the time of the motion before Judge Goddar
it had a choice: either to use the evidence then or never to
it. It made its choice and must now take the consequenc

Any other ruling would only serve to tolerate trifling wi
the Court. *Shibley* v. *U. S.*, 237 F. 2d 327, 332 (9 Cir.), ce
den. 352 U. S. 919 (1956); *Griffin* v. *U. S.*, 183 F. 2d 990, 9
(D. C. Cir. 1950).

Contrary to the Government's statement that Judge Go
dard's order did not "retroactively re-establish a privile
previously waived" (Br. No. 9, p. 11), *it positively establish*
that there had been no waiver up to the time of the decisio
and that decision is binding upon all concerned.[2]

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[2] *Zap* v. *U. S.* (Br. No. 9, p. 44) is not applicable. There this Co
held that if the document had been unlawfully seized it should not
returned since it was the means of committing a crime, and so subj
again to seizure by warrant. There was thus no point in requiring
government to perform a useless act.

At bar, Exhibits 61A-B are not subject to seizure. *Silverthor*
Lumber Co. v. *U. S.*, 251 U. S. 385 (1920). If they had been returned
petitioner, as they should have been, that would have ended the mat

It is fatuous for the Government to argue that "If petitioner had objected to their admission, the Government could promptly have established that he had no privilege as to the check" (Br. No. 9, p. 30). Object is precisely what Lawn did, and he objected in the precise manner approved by this Court in *Cogen* v. *U. S.*, 278 U. S. 221 (1929), i.e., by motions before Judges Goddard and Palmieri for the return of the documents seasonably made before the trial. Certainly Lawn is not to be penalized because he obeyed the law.

It was incumbent upon the Government on these motions to disprove Lawn's privilege, if it could, and since the Government failed to do so, Judge Goddard's order of outlawry followed by the order of Judge Palmieri necessarily bound the Government and determined the conduct of the trial. *Cogen* v. *U. S.*, *supra*, at p. 223.

D. The newly supplied alleged "evidence" is on its face suspect.

It is clear that the Government now has no right to introduce the alleged transcript of the May 1952 hearing and the alleged receipt. But the documents themselves on their face proclaim that they are suspect. There are inconsistencies throughout the document: witnesses are reported as answering questions which were directed at other witnesses; the language is at times jumpy and stilted and there are numerous breaks plainly marked "(inaudible)" in the transcript, all indicating inaccurate transcription. The extent of the inaccuracy is unaided speculation.

The alleged receipt for the papers (Br. No. 9, App. B) is dated three days after the alleged date of the administrative hearing and is signed by a Government officer who is not shown to have participated in or to have any connection with the administrative hearing.

The internal confusion in this newly presented "evidence" makes it suspect on its face. No one's liberty is to be forfeited on such a record. *Chessman* v. *Teets*, 354 U. S. 156 (1957).

E. Summary.

The crux of the Government's argument is this: "There was no possible unfairness or harm in using one particular copy of the check and stub rather than another" (Br. No. 9, p. 49). In homely terms, the Government is saying it reached into the wrong briefcase in introducing Exhibits 61A-B and came up with the wrong copy.

This goes on the assumption that there was a "right" copy, an untainted copy, available to the prosecutor. But the Government has been unable to show this, legally or factually.

All the Government's exertions cannot overcome the fact that it unconstitutionally obtained evidence from petitioner in violation of constitutional privilege, and that it unlawfully used such evidence on his trial to convict him although it was outlawed in advance of the trial. Such a conviction cannot stand.

II.

THE PROSECUTOR'S UNFAIR TRIAL TACTICS INVALIDATE THE JUDGMENT.

The Government's brief states that petitioner's trial counsel "made no objection whatever to the prosecutor's summation." (Br. No. 9, p. 51).

The failure to object does not forgive the egregious trespass on petitioner's rights because

(1) Any objection would have simply accentuated the trespass and embedded the point in the jury's mind. 6 Wigmore, *Evidence* § 1806 n. 1 (3d ed. 1940).

(2) Objection would have been useless, since the trespass was incurable. As Mr. Justice Jackson said, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949):

"The naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practicing lawyers know to be unmitigated fiction."

(3) "the errors are obvious, [or] otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *U. S. v. Atkinson*, 297 U. S. 157, 160 (1936).

The Government's brief next argues that the prosecutor's unsworn vouchers were proper because "It is the general common law rule that the party who puts on a witness, * * * vouches for his credibility'" (Br. No. 9, p. 52). It is thus no objection, the argument runs, to make these vouchers overtly to the jury.

Although a party usually vouches for the credibility of his witnesses, this only means that the party cannot impeach his witnesses, subject to numerous exceptions in the decided cases.[*]

But nowhere is there the slightest intimation that this rule authorizes an attorney—especially a prosecutor—to add his own weight to the testimony of his witnesses by unsworn statements that he and his superiors—the whole "District Attorney's office"—"vouch for them because we think they are telling the truth" (R. 2588).

The quoted language (Br. No. 9, p. 52) from the *Antonelli Fireworks Co.* case is hardly authority, especially when taken in context, as the government's brief admonishes that all quotations must be taken; for the Court immediately went on to say, 155 F. 2d at 637:

"Moreover, any possible error was cured by the forthright charge of the court instructing the jury at

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[*] Perhaps the most interesting exception for present purposes is the one allowing United States attorneys to impeach the witnesses they put on for the government in criminal trials, either directly, *Meeks v. United States*, 179 F. 2d 519 (9 Cir. 1950), or through having the court call them as its witnesses. *Ufenger v. United States*, 44 F. 2d 44 (7 Cir. 1930).

> the outset to disregard these remarks of government counsel, since the function of determining such questions of fact was exclusively its own."

The trial court's charge in *Antonelli* was as follows, 155 F. 2d at 645 n. 5:

> "I want to instruct you now that you should disregard the expressed opinion of government counsel as to the truth of the testimony given by the government witnesses and as to the falsity of the testimony given by the defendants. The province of determining the truth or falsity of any testimony is for the jury and for the jury alone, and that province may not be invaded even by the Court and certainly not by the attorney for the Government. I do not mean to infer that it was intentionally done, but it was improper to express such an opinion, and the opinion should in no way influence your verdict.
>
> "At the close of his remarks he expressed his solemn belief that all of the defendants were guilty of the charges set forth in the indictments against them. That also was improper. It may have been inadvertently said, but whether it was or not, it was improper for him to express his opinion as to the guilt of these defendants. The test of whether these defendants are guilty must be found in the evidence, and it would be entirely improper for you as jurors to allow your deliberation to be affected by the opinion so expressed. I instruct you now to disregard that opinion completely."

Even this charge did not move the late Judge Frank, who dissented, to hold that the trespass was harmless. But it is far more than petitioner Lawn received from the trial Judge in the case at bar, who not only did not instruct the jury to disregard the prosecutor's remarks, but also refused to instruct the jury that government witnesses were not to be regarded as more credible than any other witnesses (R. 2762).

The Government attempts to argue next that an attack by petitioner's trial counsel on the United States Attorney and on the special agents in his opening to the jury at the

beginning of the case (Br. No. 9, p. 53) authorized the prosecutor in his summation six weeks and thousands of pages of testimony later to make the answer that the trial prosecutor and the whole District Attorney's staff vouched for Lubben and Roth because, he said, they were telling the truth.

It should be pointed out that the quotation from the opening by petitioner's trial counsel had nothing to do with government witnesses, perjurious or otherwise (R. 2904-5). He was referring to the fact that prior government attorneys had illegally obtained indictments which Judge Goddard had dismissed, and he was courteously disassociating the present prosecutor and his staff from their predecessors (R. 2904-5).

The opening statement of defense was thus no excuse for the gross impropriety of the prosecutor's summation.

There was certainly nothing in Mr. Stryker's summation to the jury that called for the prosecutor to vouch for his witnesses. Mr. Stryker's summation stayed well within the record in pointing out to the jury the falsehoods of Lubben and Roth. It was no doubt a hardship to the prosecutor to have the perjuries of his chief witnesses pointed out to the jury from the record; but the law does not allow him to better his case by jumping into the breach himself. A trial is, after all, a quest for the truth, and no one should feel offended at the exposure of falsehood.

The cases which the government relies upon (Br. No. 9, p. 56) are not sterling authorities.[1] At any rate they do not govern here, where the prosecutor did not merely express his belief, but went further and vouched for his witnesses and

[1] The government perhaps recognized the doubtfulness of its cases by citing them under a "Cf." The prosecutor's language in the *Henderson* case does not appear in the opinion, and it is impossible to evaluate it. The prosecutor's language in the *Holt* case contained no expression of belief. The prosecutor's language in the *Tuckerman* case was temperate, and expressed a belief that the jury would convict on giving the case a fair consideration.

the truth of their tales—not he alone, but the "Government" and "the District Attorney's office."

A voucher is more than an expression of belief, as a dictionary definition shows: "v.i. 1. To bear witness; give testimony or full attestation. 2. To make assertion; affirm." The prosecutor was thus in effect calling himself, his office, and the very government itself to bear unsworn witness that what would appear to have been demonstrated to any reasonable man as the rankest perjury on the part of Lubben and Roth was really a manifestation of truth. He was thus inviting the jury to lay aside the unfavorable conclusions they could not have failed to draw about his key witnesses and to rely instead upon the authority, integrity and credibility of the government as guarantors of their credibility which had been blasted.

Wigmore properly criticizes behavior such as this, 6 Wigmore, *Evidence* § 1806 (3d ed. 1940):

> "Any representation of fact, therefore, which is *made* by him *in the argument, must not be an assertion made upon his own credit;* it must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of their notoriety as judicially noticed facts or on the opponent's judicial admission. To bring forward in argument an assertion of fact not of these two sorts is to become a witness; and to be a witness without being subjected to cross-examination is to violate the fundamental principle of the Hearsay rule."

This impropriety is underscored by further remarks of the prosecutor himself during summation. He saw from the record that the testimony of Lubben and Roth was gravely suspect. Arguing to the jury, he said "even if you have some questions about Lubben and Roth because of their background, you can't deny the documents" (R. 2604). The documents with which he sought to bolster their testimony were the unconstitutionally obtained Exhibits 61A-B.

Whether or not the prosecutor intended it, his voucher irresistibly bore the implication that the Government believed that its witnesses were telling the truth for reasons which do not appear in evidence. The cases are clear, as the Government itself recognizes in its brief, that comment by the prosecutor is improper if it leads the jury to believe that there is other evidence known to the prosecutor but not introduced

The Judge gave no more than the standard charge about the testimony of accomplices (R. 2686), but this was not tied in to the poison spread by the argument of the prosecutor. Indeed the Judge specifically refused to charge that Lubben and Roth were entitled to no greater credibility from the mere fact that they were government witnesses (R. 2762).

The Government contends that contrary to petitioner's argument, the prosecutor on summation did not urge conviction on tax matters on the basis of collateral crimes or alleged physical threats or because of personal characteristics which the prosecutor chose to attribute to Lawn (Br. No. 9, p. 38).

The government's contention is shortly disposed of by the record, from which we quote the prosecutor's argument, as follows:

> "* * * the heart of this case is fixing, it is bribery." (R. 2587)
>
> "But the fraud and the receivership I can show you when I show the Loraine books with the doctored names in it. You will see that. There is no question about the handwriting; there is no question about the change from accounts receivable to loan from William Giglio, that is there. Well, that is all Howard Lawn." (R. 2596)
>
> "* * * from that point on you have got a story of fixing and attempted fixing that is unparalleled, so far as I know, in a tax case." (R. 2602)
>
> "* * * where he [Lawn] was later able to quite successfully operate a receivership which concealed a very large part, substantially all the assets of the American Brands Corporation." (R. 2617-8)

> "* * * but it made quite a difference to Howard Lawn, because if $15,000 was a legal fee it meant it was income to him, and if the $15,000 was a loan, it wasn't income to him.
>
> "So—and this is the evidence in the record—at about the time he was preparing his personal return, this shift came, from legal fee to loan." (R. 2605)

It is plain that the prosecutor improperly created prejudice against Lawn in this tax case, with charges of collateral crimes of bribery, forgery, fraud of creditors, attempted and actual fixing, and personal tax evasion, none of which crimes were material or established by the evidence.

The prosecutor further told the jury on summation:

> "I want to read just a few more extracts from the record because I think, after reading them, you can't do anything but decide that these people must be punished; that these are the kinds of human beings that must in some way be prevented from continuing this kind of conduct; that you must, not only for the good of the community, as far as they are concerned, but for the good of other persons, to prevent it from happening again, tell the whole community, and you are the voice now of the community, that this kind of conduct is wrong." (R. 2673)

The prosecutor then recited a threat from Roth to kill Lubben, which said the prosecutor, Roth had admitted making, and concluded as follows as to all defendants, including petitioner:

> "That is Lubben talking about the kind of person that you are now deciding, kind of person whose conduct you are now deciding whether to approve or disapprove." (R. 2674)

The record amply supports petitioner's complaint that this federal prosecution failed to comply with the standards imposed by this Court and the Constitution.

III.

PETITIONER CONCEDEDLY WAS ENTITLED TO A HEARING ON TRIAL USE OF OUTLAWED EVIDENCE; THE RECORD ESTABLISHES HE WAS DENIED THIS RIGHT.

The Government now concedes that Lawn was entitled to a hearing or the right to cross-examine to discover whether outlawed evidence was the source of evidence used on the trial.

The Government states:

> "We believe Lawn is legally sound in so limiting his argument, and—going further—are in general agreement that under the circumstances he had a right to cross-examine for the purpose of discovering the sources of the evidence used *at the trial.*" (Br. No. 9, pp. 60-1)

The Government's position is that Lawn was accorded such right (Br. No. 10, pp. 19-35; Br. No. 9, p. 60). In this the Government is in error.

After the Judge had denied petitioner's right to inquire into the procedural validity of the indictment (R. 1347) the Judge made it clear that such inquiry as well as inquiry into the trial use of outlawed evidence would not be permitted. We quote from the record (p. 1354):

> "The Court: As I sit here now, I see no greater basis for my conducting a hearing than there was for Judge Palmieri conducting one, and as I recall the record that has been made before me, I see no basis yet at all for assuming—or I see no possibility of proving the use of these books. Now I think, under the circumstances, we will go along as we are, without going into the subject, and if as the trial progresses there is any basis for my conducting such a hearing at any time on any issue, why, I will do so. But I don't see it yet.

"Mr. Wolfram: Isn't it a fact, your Honor, that the only way we can establish *whether leads and clues* have stemmed from the illegal seizure is through the witnesses as they are presented to us?

* * * * *

"The Court: I believe you have completed the record on it and I am ready to hold now that in the absence of any further foundation, I am not going to go off into the use of these records before the jury, and I am not going to conduct any side hearing at this time either, because that in itself wouldn't be very feasible." (R. 1356)

Again petitioner's counsel made it crystal clear that inquiry into trial use of outlawed documents was requested and the Judge made his denial thereof equally clear:

"Mr. Stryker: The point was really that we were not able to find out whether those things were improperly obtained or not. As the record stands, it is not clear, but we were not allowed, not permitted to inquire into the fact. That is the point, and the difficulty in which we find ourselves is due to the fact that Judge Palmieri remitted that issue which he did not decide, or permit us to obtain evidence or secure evidence or cross-examine witnesses, which, in my judgment, would have given him a basis for it, so that the matter was, of necessity, thrown into this trial, which I think it should not have been.

"The Court: What he said was, I think, that there was no adequate foundation before him for such a hearing.

"Now, if an additional foundation developed before me, why, then, I would reconsider it, as, of course, I would. We would then have a new situation." (R. 2077-8)

* * * * *

"The Court: All right, Mr. Stryker, I will briefly state that I think on the record before Judge Palmieri, his determination is the law of the case. Even if it weren't, upon that record as I have gained knowledge of it through the trial and the arguments of both of you, I would decide it exactly as he did.

* * * * *

"I find nothing in the record of this trial which suggests any use of illegal clues. I find, and as I hear your summary of argument today, I don't think you have a thing more than you had before Judge Palmieri.

"Mr. Stryker: May I

"The Court: And so, I think, at this moment, I mean, my determination on this question of whether there should be a hearing or something, which you may reopen from time to time as you have anything additional to add, but as of this moment I see no basis for such a hearing." (R. 2085-2086)

Later the record discloses:

"The Court: No, we are not going into any questions at all.

* * * * *

"Right now I am concerned with making a record on the facts and on that I am not going into these questions.

"Mr. Wolfram: And your Honor's ruling covers the question of being able to ask this witness *anything about leads and clues or what was presented to the grand jury?*

"The Court: That's right. If you have any better foundation for that, you come back." (R. 2136) (Emphasis added throughout).

IV.

NO CRIME WAS CHARGED OR ESTABLISHED AGAINST PETITIONER. THE GOVERNMENT IS UNABLE TO SUBSTANTIATE THE THEORY ON WHICH LAWN WAS CONVICTED.

In the case against Lawn there is no charge by the Government or proof that any of his alleged principals failed to disclose his or its tax liability, wilfully or otherwise. Nor was it proved that Lawn had knowledge of their tax liability or the failure to pay it or of their alleged concealment of means to pay it.

The Government, without citation of authority or reasoned argument, expressed the naked opinion that a § 145(b) crime can nonetheless be made out in these circumstances (Br. p. 62, n. 18).

We have been unable to find any authority to sustain the Government's opinion, nor does the government cite any or refute the authorities cited in petitioner's main brief, which negative the Government's theory of the law (Pet.'s Br., pp. 50-4).

The Government by its *ipse dixit* seemingly would overrule and dismiss as without merit (Br. No. 9, p. 62, n. 18) the unanimous statement of this Court in *Spies* v. *U. S.*, 317 U. S. 492 (1943) at p. 498:

> "But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of congressional intent assume that mere knowing and intentional default in payment of a tax, *where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of a new degree.*" (Emphasis supplied.)

V.

THE PETITIONER'S CHARGE THAT PRIMA FACIE PROOF OF GUILT IS ABSENT HAS NOT BEEN OVERCOME. THE GOVERNMENT'S BRIEF IS UTTERLY DEVOID OF FACTS TO ESTABLISH GUILT.

Lawn has plainly challenged the conviction on the fundamental absence of evidence connecting Lawn with the crimes charged or establishing to the remotest degree that Lawn knew the taxpayers owed taxes, had not paid their taxes, and did not intend to pay their taxes. The Government brief has failed to point to *evidence* of either Lawn's connection to the crimes or to any such knowledge. Indeed, the Government fails to even mention or touch on the issue of Lawn's knowledge of facts requisite to implicate him.

1. The Government insinuates that the petitioner's brief has ignored evidence in this challenge to the sufficiency of the proofs (Br. No. 9, p. 62). However, the Government fails to point to a single item of evidence of any substance which the petitioner has failed to mention or treat in his brief. None of the trivia which the government points to is evidence as of connection of Lawn to crime, or b) of his requisite knowledge that the taxpayers owed taxes, had not paid them, and did not intend to pay their taxes.

Indeed, the schedule meticulously prepared by the petitioner (Pet.'s Br. p. 80) is apparently conceded to be an entirely accurate reflection of all the testimony. Not a single additional citation to the testimony is given by the Government.

The Government seizes on the fact that the schedule does not mention exhibits which referred to or were connected with Lawn. Only three exhibits—61A-B and 90—could conceivably be connected with Lawn. But, as the Government knows, these have been treated in petitioner's main brief; they were not omitted from petitioner's consideration of everything pertinent to a) Lawn's connection to crime, if any, or b) Lawn's knowledge, if any, that the taxpayers owed taxes, had not paid them, and did not intend to pay their taxes. The Government has been unable to point out the requisite facts in the evidence.

2. The Government summarizes what it thinks is its case against Lawn as follows:

> "To establish its case, the Government offered evidence * * * (3) that Giglio and Livorsi were the principals in the conspiracy * * * and (4) that Lawn and Roth provided the legal and accounting services required to carry out the conspiracy." (Br. No. 9 p. 5)

The Government does not document this sweeping assertion and only at page 65 in its brief does the Government again claim that Lawn provided legal services. The simple reason

for absence of documentation therefor is that there is absolutely no evidence that legal services were rendered by Lawn; the evidence is to the contrary. The Government has unfairly mingled Lawn's background with the nature of his services and his functions in the instant enterprises.

In order to put an end to any question whether Lawn rendered any legal services for the other defendants, we detail all of the legal services mentioned in the record and name the person who provided them, according to the record evidence:

a. The partnership formation was handled by attorney Goldhill (R. 300).

b. The corporate papers were drawn and the corporations were formed by attorney Rossbach (R. 1115).

c. The real estate transactions were handled by attorneys McCue, Tepper, Fox and perhaps Cornwall (R. 1222-3, 2951).

d. Taxes were handled by tax experts Rabner & Portner and James Ronayne (R. 1005, 1006, 1009, 1076).

e. The receivership was handled by attorneys Goldberg, Kohn and Wexler (R. 1175-6).

f. The handling of tax audits and relations with the Internal Revenue Bureau were handled by tax expert Ronayne (R. 1009, 1076).

g. The proceedings in Giglio's bankruptcy were handled by some attorney, but the evidence is that Lawn did not function as Giglio's attorney (R. 2279).

3. The Government attempts to escape the fact that the conspiracy alleged terminated when the tax was due, September, 1917.

This fact would preclude its allusions to later events to connect petitioner to the crimes charged. Petitioner's brief (pp. 67 *et seq.*) clearly shows that the government's argu-

ments are bottomed on scraps of evidence of Lawn's acts after the tax was due in September, 1947 and the conspiracy alleged in this case was dissolved, its ends achieved. There is no charge in the indictment that thwarting prosecution was part of the tax conspiracy to avoid tax payments. See, *Grunewald* v. *U. S.*, 353 U. S. 391 (1957).

To offset the effect of the Judge's charge in agreement with petitioner's contention that acts after the tax was due, September, 1947, could not establish a connection with the conspiracy charged and being tried, the Government says that the Judge made no such statement and it then quotes from the charge at R. 2717 but neglects to relate the actual charge on the point at R. 2716 and R. 2718, as follows:

> "Now I think that in order to find either defendant guilty under this account [sic] you must be convinced beyond a reasonable doubt that when the tax was due it could have been paid, if the assets had not been concealed." (R. 2716)
>
> "And, again, you must be convinced beyond a reasonable doubt that if they had not so concealed the assets of that corporation, that the tax could have been collected when it was due." (R. 2718)

1. The Judge charged that, in order to hold Lawn the Government had to prove that Lawn knew (1) the taxpayers owed taxes (2) the taxes were not paid, and (3) the taxpayers did not intend to pay the taxes (R. 2716, 2717-8). The Government has now virtually conceded that the prosecution failed to prove those essential elements of knowledge on the part of Lawn.

The Government now says simply that Lawn "knew the corporate income tax return for 1946 was being filed late, for he signed the request for an extension of time in which to file" (Br. No. 9, p. 66).

Obviously, this would not establish the requisite knowledge of the tax crime charged and even this statement by the Government is erroneous.

The paper referred to in the Government's brief is Exhibit 90 (not certified as part of the record herein) which according to the evidence, was filed on September 23, 1947 (R. 1146) after the corporate return for 1946 was concededly filed (Br. No. 9, p. 144). If then this paper was an application for extension of time to file returns, it must have related to some tax year, other than 1946, not involved in the indictment.

5. The Government has set forth in its brief a few wholly lawful and normal activities on the part of Lawn, and has attempted to weave a web of suspicion around those wholly lawful activities in an unsuccessful attempt to entangle Lawn. However, the Government has failed to establish even suspicion, and in any event the activities ascribed to Lawn have no connection with the crimes charged in the indictment.

For convenience we lump the activities ascribed to Lawn in their respective categories.

a. The bulk of the Government's brief is addressed to statements made about Lawn by someone else in Lawn's absence (Br. No. 9, pp. 63, 64, 71-2).

Suffice to say at this point that the Judge expressly charged that such "evidence" could not be used to connect Lawn with crime (R. 2695). See also our main brief (Pet. Br. 71-2).

b. The second largest part of the Government's so-called proof relates to what someone else said, allegedly in Lawn's presence, without any indication from Lawn whatsoever as to whether he agreed or disagreed with the statement (Br. No. 9, p. 64). As shown in our main brief, Lawn's mere presence without more does not make him a party to crime (Pet. Br. 63-4).

c. The Government further relies on the fact that Lawn drew salary and stock for his employee services and obtained the stock for $15,000 and that no withholding tax was deducted therefrom, and that Lawn International (a corpo-

tion) borrowed moneys from ABC (Br. No. 9, pp. 12, 65, 70-1).

Lawn's taxes are not involved in this indictment, and there is no proof or claim that Lawn did not pay his personal taxes on the salary and stock that he drew.

The fact that Lawn International may have borrowed or drawn moneys from ABC (Br. No. 9, pp. 70-1) is immaterial. Lawn International was not Lawn and there is no proof that it was. Early in the trial the prosecutor plainly disassociated Lawn International from this case (R. 276).

6. Another facet of the Government's claimed proof of Lawn's connection, concerns the purchase and sale of Giglio's house (Br. No. 9, pp. 66, 67, 80).

These were wholly innocent transactions, having no connection with the alleged crime (see Pet. Br., pp. 72-6) and the Government's brief does not show any connection therewith with crime.

The Government claims that, Lawn introduced a New Jersey lawyer to Giglio who could handle a New Jersey real estate transaction and suggested that Roth, a party to the transaction, should pay the $200 fee for the legal services "to make it look good" (sic) (Br. No. 9, p. 67). The proof shows that Tepper, the New Jersey real estate lawyer, was the only lawyer present at the closing (R. 1223), that Lawn did not act as an attorney (R. 1223) and that Roth lied when he originally testified that attorneys Fox and Goldhill had represented him at the closing (R. 1222). The statement "to make it look good" was made by Roth (R. 1222) before he realized he had so lied (R. 1223).

Accordingly, Tepper was entitled to be paid by someone and that someone turned out to be Roth.

The Government seeks by intermingling two entirely separate transactions (spaced nine months apart) to create an aura of fraud around a legitimate real estate transaction

(Br. 9, p. 70). The transaction in September 1947 was clearly no concealment, since Giglio's equity was at all times recorded in the proper legal office (Ex. 55, R. 595).

But, says the Government, since Roth, on the sale of the house in June 1948, predated a check which he obtained and gave the cash to Giglio for Giglio's equity, the original September 1947 transaction was somehow fraudulent.

Of course, Lawn was not present in June 1948 when Roth says he did these things, and there is no proof that Lawn had any knowledge thereof whatsoever (R. 1227-34). Roth did not testify that his June 1948 conduct had any relation to the September 1947 transaction; and the record seems plain that even Roth had no advance knowledge Giglio would want cash, or later knowledge of what he did with it, and that Roth simply dated the check incorrectly (R. 1229, 1231).

7. The Government places heavy reliance for a connection of Lawn to the tax evasions charged to the other defendants on what it claims was a fraudulent New Jersey receivership (Br. No. 9, pp. 65, 66, 67).

We have carefully analyzed the proof dealing with the receivership in our main brief and have shown that under no circumstances could the subsequent state court receivership have any connection with the crimes charged here (Pet. Br. pp. 68-9). We show here that the receivership was not even in fraud of creditors.

There is absolutely no proof that Lawn had anything whatsoever to do with nor was he the attorney in the New Jersey receivership. This was handled by Attorneys Goldberg, Kohn and Wexler (R. 1175-6).

The criticized plan was outlined in May or June 1948 (R. 1175) by Roth and was supposedly a plan of defense to the involuntary receivership proceedings filed by a *bona fide* creditor. Lawn did not dissent from Roth's plan of defense on Giglio's behalf (R. 1177).

Lawn owed nothing to the insolvent corporations, and, according to Roth, the debts in Roth's name were actually owed by Giglio (R. 1175-6). The assertion by the Government that "petitioners" owed debts (Br. No. 9, p. 70) is wholly without warrant (R. 1175-6). Thus, apparently, Giglio was the only one of the defendants who owed moneys to the insolvent corporations. Lawn derived no benefits from the receivership.

Giglio was the sole owner of Eatsum Food Products Company, a sole proprietorship, i.e., an individual doing business under an assumed name. Giglio was also the sole owner of Loraine Food Corporation (R. 1175, 1177).

Loraine was not in the receivership (R. 1180) and there is no charge in this indictment that the assets of Loraine were concealed.

ABC and ABW (American Brands Wholesale) owed moneys to Loraine and Eatsum—in short, they owed moneys to Giglio (R. 1177). Giglio owed moneys to ABC and ABW (R. 1177). The debts due to ABC and ABW were, according to the Roth "plan" to be offset against debts due from ABC and ABW to Loraine and Eatsum (R. 1177).

It is plain that Giglio and Eatsum were one and the same person, and hence it was perfectly valid to offset the debts to Eatsum against debts owing from Giglio; these debts were in law mutual and could be offset in insolvency proceedings.

With respect to the offset of Giglio's debts against debts owing to Loraine, the question is one of identity. Was Giglio in fact and in law the same as Loraine? The evidence indicates that he was (R. 1177). If this is so, then those debts were mutual and could be offset.

The fraud, according to the prosecutor, consisted of changing the words "account receivable" to "loan receivable" on the Loraine books (R. 2630). We fail to see any distinction

in such change of titles; they both evidence liabilities owing to the party named.

The prosecutor's characterization of the so-called plan of defense as a fraud was a matter plainly beyond the comprehension of an ordinary jury which naturally might rely on the opinion of the representative of the United States in such a matter.

The so-called perjury by prearrangement (Br. No. 9, pp. 22, 67) related to matter legally irrelevant to this tax case (R. 1532, 1534). The claim that the "false testimony" was by "prearrangement" was inserted unresponsively by Roth when he was trapped by his own perjury (R. 1532, 1534). Again, in relation to the receivership, the assertion by the Government that "falsified ledger sheets were submitted" in Lawn's presence at the May or June meeting when the defense to the receivership was "planned" (Br. No. 9, p. 70) is utterly without support in the record, and there was no discussion whatsoever at that meeting of falsifying any records (R. 1175-7).

The episodes of the receivership do not support the attempt to connect Lawn with the tax crimes asserted in this indictment.

8. The next category of so-called proof in the attempt to connect Lawn with non-payment of taxes is the evidence that Lawn attempted to head off prosecution after he was under information and indictment (Br. No. 9, pp. 68-9). This is completely answered in our main brief (Pet. Br., pp. 69-72).

9. The Government refers to other trivia or irrelevancy in an attempt to connect Lawn.

a. Thus Lawn was supposed to have asked Roth to prepare a false financial statement for issuance to Dun & Bradstreet (Br. No. 9, p. 64).[1] This is not the crime charged here and constitutes no link in the crimes charged.

b. The Government gratuitously says that "Lawn, *as legal adviser*, was 'instrumental' in organizing the various 'American' corporations early in 1946." (Br. No. 9, p. 65)

The Government fails utterly to document its gratuitous description of Lawn "as legal adviser" in this or any other connection.

The record references cited by the Government show that Lawn as head of research was instrumental in forming the corporations in anticipation that his research had neared fruition (R. 11245).

c. The Government says that when Lubben withdrew from Eatsum he did so over Lawn's protests. (Br. No. 9, p. 10). The cited references, however, are to protests by Giglio who wanted Lubben to stay in the partnership (R. 359-60).

d. The Government claims that Lawn once said he had terrific connections in the West and could "buy black market corn better and cheaper and faster." (Br. No. 9, p. 64). There is no statement in the record by Lawn that he could buy "black market corn" (R. 333, 1092). Even if Lawn had referred to black market corn, that is not the crime charged herein.

In sum, the Government has pointed to a few irrelevant activities on the part of Lawn having no substance towards establishing complicity in the tax crimes charged to the other defendants. The Government has not attempted to link these perfectly normal and lawful activities of Lawn to the crimes charged. The Government has apparently given up any attempt to show that there was evidence that Lawn had the requisite knowledge that 1) the taxpayers owed taxes, 2) that the taxes were not paid by the taxpayers, and 3) that the taxpayers did not intend to pay their taxes.

VI.

THE TRIAL BELOW MEETS NONE OF THE FEDERAL REQUIREMENTS FOR A FAIR TRIAL. THE JUDGMENT BELOW SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

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